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Supreme Court of the United States

October Term, 1959

No. 220

WILLIAM O'DWYER and SLOAN O'DWYER,
Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONERS

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We are suprised to find in a brief signed by the Solicitor General a statement representing to the Court that Petitioners' First Question Presented, namely, *whether a gift* made as a campaign contribution *may be taxed as income*, was "first argued in the Court of Appeals" (Br. Opp. 11).

We quote from the petitioners' reply brief below, in the Court of Appeals, page 1:

> "We are surprised at the Government's statement that 'he did not choose to argue that, even if received, such payment did not constitute taxable income' (br. 16) and 'neither in his briefs nor elsewhere in the Tax Court did he attempt to argue that issue' (br. 37).
>
> "The petitioners' brief in the Tax Court, however, contained the following (p. 35, Tax Court Brief for Petitioners):
>
> > 'Crane said that he made a contribution to the petitioner's political campaign. Such contributions, the Department has ruled, to be not taxable to the candidate and that has been the usual and regular practice of the Department.

> We venture to say that this case is unique in its attempt to treat a contribution to a political campaign as taxable income to the candidate.'
>
> "The Tax Court was certainly sufficiently troubled by the argument to recognize the issue, consider it, and decide it. The question is necessarily before this Court for review.'"

The Court of Appeals, likewise, considered, reviewed, and discussed in its opinion this serious and major question (Pet. 49-52) and did not even refer to the inaccurate claim that the issue was first raised in that Court.

The question of taxability of a political gift as income having been considered by *both* lower courts, and decided in a manner incompatible with past decisions of this Court and pertinent legislation, merits review by this Court.

The Government's brief in opposition is misleading, if not deceptive, in its formulation of the issues at the outset of its Argument commencing at page 9. The Government attempts to create the impression that the taxpayers in their petition for certiorari have raised an issue of fact. This is contrary to the fact. The Government's brief makes reference to Petitioners' Statement of the Case and suggests to this Court that taxpayer "attacks the finding of the Tax Court." The petitioners' proposed question Presented belies this statement, and the principal argument set forth under "Reasons Relied on for Allowance of the Writ" is pitched solely to the proposition:

> "Even if Crane gave a campaign contribution to petitioner, such gift did not constitute receipt of taxable income." (Pet. 11)

The case presents significant and troublesome questions as to the scope of taxing power with respect to political gifts, and as to the fairness of procedure in the Tax Court, where the Government enters as a litigant with secret evidence amassed by exercise of a vast panoply of investigative powers, and the taxpayer, against whom there is a "presumption of correctness," enters with no pre-trial discovery techniques available.

There is also presented the serious question, not hitherto considered by this Court, as to the effect of the Administrative Procedure Act on the Tax Court *as a court*.[1]

The brief in opposition has not been candid nor fair in meeting the issue whether the true questions presented by this record should be reviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PAUL O'DWYER,
HOWARD N. MEYER,
Attorneys for Petitioners.

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[1] The Government blandly states that the Tax Court is not a "reviewing court" (Br. Opp. 18) without so much as a word to explain the express statement in page 10 of the Attorney General's Manual that *it is a court* under the Act.